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Case No: CO/1242/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 6 April 2020

Before:

LORD JUSTICE COULSON
and
MR JUSTICE HOLGATE

- -

Between:

CHRISTOPHER PACKHAM CBE	**Claimant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**First Defendant**
THE PRIME MINISTER	**Second Defendant**
HS2 LTD	**Interested Party**

David Wolfe QC and Merrow Golden (instructed by **Leigh Day**) for the **Claimant**
Timothy Mould QC and Jacqueline Lean (instructed by **The Government Legal Dept**) for the **Defendants and Interested Party**

Hearing date: Friday 3rd April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 16:00 on the 6th April 2020.

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LORD JUSTICE COULSON and MR JUSTICE HOLGATE:

1. INTRODUCTION

1. This is the Judgment of the Court, to which we have both contributed.

2. The claimant is a well-known television personality and environmental campaigner. By judicial review proceedings commenced on 27 March 2020, he seeks to challenge the decision made by the First Defendant to continue with the HS2 rail project. As part of that application, the Claimant seeks an interim injunction to prevent the carrying out of clearance works in six different woodlands, most but not all of which are in Buckinghamshire, which would otherwise be due to occur over the next few days. Although the hearing on 3 April 2020 was listed to consider only the injunction application, it became apparent that it was not practicable to distinguish between the first part of the test for an interim injunction (namely, whether the claimant has a realistic prospect of success), and the test for whether permission to bring judicial review proceedings should be granted. Accordingly, the court considered both the merits of the judicial review challenge and the claim for an injunction. The parties agreed with this approach.

3. Due to the extreme urgency of the application, at the end of the hearing, after a short break in which the court considered its conclusions, the parties were told that permission to bring judicial review proceedings would be refused because the Claimant's claim did not have a realistic prospect of success. In addition, the court said that, even if the Claimant did have a realistic prospect of success, the balance of convenience (the second part of the test for an interim injunction) favoured the continuation of the clearance works. The court said that it would endeavour to give written reasons for those conclusions by the end of Monday 6th April.

4. These are those reasons. They are set out in the following way. In Section 2, we set out the factual background. In Section 3, we address the question as to whether the application for judicial review was made promptly. In Section 4 we deal with what we consider is the limited basis on which the relevant decision could be impugned by this court. In Sections 5-8 inclusive, we deal with each of the four Grounds for the application and explain why we have concluded that they each have no realistic prospect of success. In Section 9, we explain why, even if the application had a realistic prospect of success, the balance of probabilities favoured not granting the injunction sought. There is a brief summary of our conclusions in Section 10.

5. We should emphasise that this court is only concerned with whether the decision being challenged is unlawful in some way. We are of course aware that members of the public have strongly held views for and against the HS2 project, but it is important to stress that it is not part of the court's role to deal with its pros and cons.

6. In view of the coronavirus pandemic, the hearing took place remotely, observed by many members of the Press who had asked to join via Skype. That it can be accounted a success was entirely due to the clarity of leading counsel's oral submissions, and the hard work and organisational skills of our clerks. The court expresses its gratitude to all those involved.

2. THE FACTUAL BACKGROUND

2.1 The Legislative Context

7. HS2 is a national high-speed railway network which, on its completion, will connect London, Birmingham, Manchester and Leeds. It has proved controversial twice over: once during the detailed consideration of the Bill, which eventually became law in 2017 ("the 2017 Act")[1], and again in the autumn and winter of 2019/2020, when the First Defendant reviewed the HS2 project and decided, on 11 February 2020, to continue with the project.

8. The HS2 project is being carried out on a phased basis, under the 2017 Act, which gives the necessary powers for the construction and operation of phase 1. The Interested Party was created by the First Defendant in 2009 and given responsibility for development and delivery of HS2 on behalf of the Government. It is the appointed 'nominated undertaker' for the construction of Phase 1 of HS2, from London to the West Midlands. It is only Phase 1 which has so far been permitted to proceed.

9. Both the strategic case for HS2 and the proposed route for Phase 1 were the subject of a national public consultation carried out by the First Defendant between February and July 2011. Amongst the principal issues raised for public consideration were (a) the need for a major increase in rail capacity and for a major improvement in connectivity between cities; and (b) whether there were alternative options. The Court of Appeal subsequently held that the 2011 public consultation on the proposed high speed rail strategy, proposed Phase 1 route and consideration of alternatives had been lawfully carried out: see *R (HS2 Action Alliance Ltd) v Secretary of State* [2013] EWCA Civ 920.

10. In January 2012, the Government published its adopted high-speed rail strategy and the route for Phase 1. A Bill seeking powers for the construction and operation of Phase 1 was introduced into Parliament in November 2013. In early 2014, the Supreme Court dismissed appeals against the decision of the Court of Appeal, holding (inter alia) that the objectives of EU law in respect of environmental impact assessment of Phase 1 were capable of being fulfilled through the Parliamentary process: see *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324.

11. In February 2017, Phase 1 was authorized by the enactment of the 2017 Act. Relevant sections include:

    a) Section 1, which gives power to the nominated undertaker to construct and maintain the works specified in the first schedule to the Act – the "scheduled works" – being works for the construction of Phase 1 and works consequential on, or incidental to, such works.

    b) Section 15 and paragraph 1(2) of schedule 16, which give power to the nominated undertaker to enter onto and take possession of land for Phase 1 purposes. "Phase 1 purposes" include "anything being done or required

[1] Its long title is "An Act to make provision for a railway between Euston in London and a junction with the West Coast Main Line at Handsacre in Staffordshire, with a spur from Water Orton in Warwickshire to Curzon Street in Birmingham; and for connected purposes".

for the purposes of or in connection with the works authorized by this Act".

c) Section 20, which granted deemed planning permission under Part 3 of the Town and Country Planning Act 1990 for the carrying out of development authorized by the Act. In the case of development authorized by the Act which consists of the carrying out of an element of work which is not scheduled works, that development falls within the scope of the deemed planning permission if it is covered by "an environmental statement in connection with the Bill": section 20(2)(c) of the Act.

d) The deposited statements which constituted the environmental statement in connection with the Bill are identified in sections 68(4) and (5) of the Act. Environmental information about the works for Phase 1 purposes which are the subject matter of the present application for an injunction is contained in those deposited statements.

e) The "Act limits" for Phase 1 purposes include land or any other thing if it is within the limits of land to be acquired and used: section 68(2)(b) of the Act. The limits of land to be acquired and used are shown on the deposited plans (sections 61 and 68(1) of the Act). The works for Phase 1 purposes which are the subject matter of the present application for an injunction are to be carried out on such land.

f) The "nominated undertaker" is a person appointed by the Secretary of State for such purposes of such provisions of the Act as may be specified in the order of appointment: section 45(1) of the Act. The works for Phase 1 purposes that are the subject matter of the present application for an injunction fall within the purposes specified in the order by which the First Defendant has appointed the Interested Party as nominated undertaker.

12. Section 68(5)(a) of the Act records that, in November 2013, the Promoter of the Bill (the Department of Transport) deposited an environmental statement ("ES") in pursuance of Standing Order 27A of the House of Commons relating to private business (environmental assessment). Subsequently during Parliamentary scrutiny of the Bill, supplementary environmental statements ("SES") were published, as is recorded in section 68(5)(b) of the Act. Both the ES and SES were subject to public consultation in accordance with the requirements of Standing Order 224A, and a summary of the results of that public consultation was compiled by an independent consultant appointed for that purpose and reported to MPs in advance of Second Reading and (in the case of SES) Third Reading of the Bill in the House of Commons.

13. Both the ES and the SES contained detailed accounts of the effects of works to be carried out for Phase 1 purposes on wildlife, including European Protected Species, their habitats and on designated ancient woodlands and other areas of woodland affected by the works now authorized by the Act. Both the ES and the SES contained detailed arrangements for mitigation of those effects where they could not be avoided; and for compensation of those effects where they could not be fully mitigated. The ES also provided an assessment of the performance of Phase 1 of HS2 as proposed to be

authorized under the Bill against the then current legislative, regulatory and policy requirements and objectives in respect of climate change.

14. In addition, the Interested Party is under a contractual duty under the HS2 Phase 1 Development Agreement to comply with the published Environmental Minimum Requirements ("EMRs") for construction of Phase 1 of HS2. The objective of the EMRs is to ensure that Phase 1 of HS2 is delivered in accordance with the ES and SES, and thus in accordance with the deemed planning permission granted under section 20 of the Act. In *R (Hillingdon LBC) v Secretary of State* [2019] EWHC 3574 (Admin) at [21] to [22], Lang J gave a helpful summary of the purpose and principal components of the EMRs. They include a Code of Construction Practice and an Environmental Memorandum. Although we were told that this decision is under appeal, it appears that the appeal does not concern that part of the judgment dealing with EMRs.

15. Section 9 of the HS2 Phase 1 Code of Construction Practice (February 2017) imposes obligations on the Interested Party for the protection of ecological interests, including protected species, statutorily protected habitats, other habitats and features of ecological importance, including ancient woodlands. In August 2017, after the Act had been passed, the Interested Party published an Ancient Woodland Strategy for Phase 1 of HS2, which sets out more detailed arrangements for managing the impact of construction of Phase 1 of HS2 on those areas of designated and other ancient woodland in which works are authorized to be carried out under the powers of the Act. The court was taken briefly to this document during oral argument.

16. The Act does not relieve the Interested Party as nominated undertaker (or its appointed contractors) of the duty to comply with, for example, the requirements of Parts 3 and 4 of the Conservation of Species and Habitats Regulations 2017 (SI 2017 No. 1012) ("the Habitats Regulations") in respect of the protection of species and habitats. The Interested Party is therefore required to obtain the necessary licences from the competent authority, Natural England, under Part 5 of the Habitats Regulations (and other similar legislation) before undertaking any licensable activities. The nominated undertaker and its contractors must comply with the terms of such licences in undertaking the licensable activities that are authorized by their grant. Peter Miller's witness statement (with two minor corrections made during the hearing) shows that the required licences have been sought and granted in respect of the licensable activities involving protected species and their habitats that are necessary and so programmed for Phase 1 purposes during April and May 2020.

17. Both the effects of construction of Phase 1 on protected species, habitats, ancient and other woodlands, and the adequacy of the proposed arrangements to control, mitigate and compensate for those effects under the Bill, in the ES and SES and under the EMRs, were the subject of petitions to both Houses from local authorities, national and local wildlife trusts and the Woodland Trust. The Select Committees of each House appointed to hear and report on petitions against the Bill heard those petitions. The petitioners led expert evidence in support of their petitions. Thus, by way of example, the House of Lords Select Committee on the Bill heard and reported its conclusions on the petition of the Woodland Trust concerning the adequacy of the Promoter's arrangements for the control of works within ancient woodlands and of proposals to compensate for the unavoidable loss of such woodland resulting from the construction of Phase 1 of HS2.

2.2 The Oakervee Review ("OR")

18. On 21 August 2019, the Oakervee Review ("OR") was announced by the First Defendant "to look at whether and how HS2 should proceed". Its terms of reference were published the same day. In summary those terms said that the OR would review:

- The deliverability of the project by HS2 Limited
- benefits of the project
- costs of the project
- whether assumptions of the business case were realistic
- the potential for cost reductions, including changes to scope, phasing or specification
- the direct costs of reprioritising, cancelling or descoping the project
- whether and how the project could be reprioritised
- whether any improvements would benefit integration with other rail projects
- lessons from the project for other major projects

19. The terms of reference also recorded that the OR "will assemble and test all the existing evidence in order to allow [the Defendants] to make properly-informed decisions on the future of Phases 1 and 2 of the project…". This was important because, as the Report made clear, the time constraints meant that the OR did not involve any call for evidence. The terms also said the OR "should rigorously examine and state its views on" a variety of matters, including the full range of benefits (including environmental benefits) and the full range of costs. In essence, it was a costs/benefit review. The terms of reference set out the ten members of the OR Panel ("Panellists"), to be chaired by Douglas Oakervee. Support was to be provided by the Department of Transport and was to be sufficient "to allow a searching and rigorous review in a relatively short time". The appointments of the Panellists were from 21 August to 31 October 2019. They referred to a "working deadline" for the Report of 18 October.

20. On 3 September 2019, the First Defendant released the "stocktake report" that the Chairman of the Interested Party had submitted to him on the cost and deliverability of the current HS2 scheme. He also made a statement to the House about the OR. He described the OR as "an independent, cross-party review led by Douglas Oakervee into whether and how HS2 should proceed". The OR would consider "its affordability, deliverability, benefits, scope and phasing, including its relationship with Northern Powerhouse Rail". He referred to the published terms of reference for the OR. He continued:

> "The Chair will be supported by the Deputy Chair, Lord Berkeley, and a panel of experts from business, academia and transport to ensure an independent, thorough and objective assessment of the programme. Panellists will provide input into, and be consulted on, the report's conclusions.

> The review will report to me this autumn. I will discuss its findings with the Prime Minister and the Chancellor of the Exchequer. Its recommendations will inform our decisions on our next steps."

21. The First Defendant also addressed the issue of works currently taking place on Phase 1 of HS2. He said:

> "During the short period in which the independent review completes its work I have authorized HS2 Ltd to continue the current works that are taking place on the project. This will ensure that we are ready to proceed without further delay for the main construction stage of Phase 1 in the event that the government chooses to continue."

22. In the event, this did not prove possible. On 16 September, the First Defendant announced that he had instructed the Interested Party to review its ancient woodland clearance programme and assess what removals could be halted until after the OR had reported in the autumn. He ordered that, during that period, removal of ancient woodland should cease unless shown to be absolutely necessary to avoid major cost and schedule impacts, should the scheme proceed as planned. In a letter dated 27 September to the claimant's solicitors, the Government Legal Department accepted the irreplaceability of ancient woodland.

23. On 2 October, the Interested Party announced that works affecting 11 ancient woodlands would be deferred until the OR was concluded. Six sites (now the subject of the injunction application) would be deferred until early 2020. Five further sites would be deferred until autumn/winter 2020. This was referred to as "a sensible balance". The Interested Party stated that, in the meantime, it would be necessary to carry out certain measures in those woodlands to protect wildlife and certain essential preparatory works. Mr Doran explains in his witness statement in these proceedings that these measures were designed to mitigate the impact of delay and additional cost of delivery of the Phase 1 project.

24. On about 7 November, a week after the term of appointment of the Panellists had come to an end, a draft version of the OR Report was leaked to the Press. On behalf of the Claimant, Mr Wolfe QC sought to rely on some of the differences between the leaked draft and the final version of the Report. We return to that point at Section 5 below.

25. Lord Berkeley, the Deputy Chair of the OR, had always been unhappy with the process that the OR had adopted. This dissatisfaction went right back to the original terms of reference, which he had sought to expand in numerous ways. His proposed additions, which were extensive and shown in yellow on the document in the bundle, essentially concerned economics and deliverability. He made only one reference to environmental issues: "environmental disbenefits - damage to environment during construction". On 11 November, after his formal appointment as a Panellist had come to an end, he made his views clear in a two-page letter to Douglas Oakervee. The main thrust of the letter was said to be "the process of the report's preparation and its outcome". Much of the letter was about the alleged failure to consider the question of costs properly. He also sought to reopen some of the debates which had been resolved by the 2017 Act, such as the decision to terminate at Euston, as opposed to his own preference, which was Old Oak Common, in West London. He made no reference anywhere in his letter to any environmental concerns.

26. Lord Berkeley made it plain in his letter that he intended to publish his own Dissenting Report, which he did on 5 January 2020. That Report ran to 71 pages. It was again largely concerned with the issue of costs. In the detailed 3-page summary, environmental matters are dealt with in just over 2 lines. There is, unsurprisingly, a considerable overlap between the concerns and complaints in his letter of 11 November 2019 and his Dissenting Report of 5 January 2020, and the content of his witness statement in these proceedings. This goes particularly to Grounds 1 and 4 of the judicial review claim.

27. The Dissenting Report was published several weeks prior to the Second Defendant's announcement to the House on 11 February 2020 (and publication of the OR report itself on the same date). It received wide press coverage. Mr Haslam confirms in his witness statement that the First Defendant was well aware of its contents when he made the decision under challenge.

2.3 The Decision of 11 February 2020 and Subsequent Correspondence

28. On 11 February 2020, the Second Defendant made his announcement to the House. He said:

> "The review recently conducted by Douglas Oakervee…leaves no doubt as to the clinching case for high speed rail. A vast increase in capacity…making it so much easier for travellers to move up and down our long narrow country. That means faster journey times, not just more capacity – faster journey times… but this is not just about getting from London to Birmingham and back, this is about finally making… a rapid connection from the west Midlands to the northern powerhouse, to Liverpool, Manchester, Leeds, and simultaneously permitting us to go forward with Northern Powerhouse Rail across the Pennines finally giving the home of the railways the fast connections they need; and none of it makes any sense without HS2… And if we start now, services could be running by the end of the decade. So today…. the Cabinet has given high speed rail the green signal. "

The report of the OR was also published on 11 February 2020.

29. The Government website describes the Report in this way:

> "The Department for Transport announced in August 2019 that Douglas Oakervee would chair an independent review of HS2.
>
> The review was asked to assemble and test all the existing evidence in order to allow the Prime Minister, the Secretary of State for Transport and the government to make properly-informed decisions on the future of Phases 1 and 2 of the project, including the estimated cost and schedule position.
>
> The review was supported by a panel of experts, representing a range of viewpoints, to ensure an independent, thorough and objective assessment."

30. Thereafter, there was a good deal of pre-action correspondence from the claimant's solicitors. Much of it was overlong and repetitive with an unfortunately imperious tone. For example, the pre-action letter of 28 February, which sought "all documents

specifically considered by the Prime Minister and Secretary of State themselves for the purposes of making this decision" (not a list, but the documents themselves) extended to 17 pages (not counting Appendix B).

31. The response was dated 11 March 2020, which (amongst other things) said that the OR "was not, and was never suggested to be, a wholly self-contained evaluation of HS2". Following further correspondence, on 16 March 2020, the Government Legal Department wrote to the Claimant's Solicitors in the terms set out in paragraph 17 of the Statement of Facts and Grounds, informing them that, since a decision had now been made on the future of HS2, clearance works were now likely to resume in accordance with the Interested Party's current programme. As previously noted, these proceedings were commenced on 27 March 2020.

2.4 The Evidence

32. Given the flurry of last-minute material, it is sensible to set out the evidence that this court has considered in reaching its conclusions.

33. That comprises:

    a) The bundle of 786 pages provided by the claimant's solicitors;

    b) The witness statements of the claimant, Lord Berkeley, Mr Clive Higgins and Ms Caroline Thomson-Smith included in that bundle;

    c) The witness statements of Mr Peter Miller (and exhibit PM1), Mr Rob Doran and Mr Philip Haslam, served on 2 April 2020;

    d) The witness statements and exhibits of Ms Lucy Ryan of the Woodland Trust, and Mr Mark Thomas of the RSPB, served on behalf of the claimant on the afternoon of 2 April. There was no proper explanation as to why these statements were served so late.

34. We note that, with the exception of Lord Berkeley's statement, much of the witness evidence served on behalf of the claimant comprised various complaints about the way in which the Interested Party was carrying out the works permitted by the 2017 Act. This material was wholly irrelevant to the legal basis of the claimant's challenge or the application for an interim injunction. It seems to have been included for prejudicial purposes. In the circumstances of an urgent application made in the middle of a health crisis, we regret that anyone saw fit to include this material in an already overlong bundle.

3. WAS THE APPLICATION MADE PROMPTLY?

35. As noted above, it is necessary for the court to consider whether or not the claimant's claim has a realistic prospect of success. If the court concluded that the application for judicial review had not been made promptly in accordance CPR 54.5(1) permission would be refused in any event. We acknowledge that this issue did not emerge from the skeleton arguments, but it seemed to us to arise directly from the papers we had considered prior to the hearing. We therefore asked Mr Wolfe QC to deal with it during his oral submissions.

36. The OR report and the decision to proceed with HS2 were both published on Tuesday 11 February 2020. The pre-action protocol letter was not sent until 28 February 2020. These judicial review proceedings were commenced on Friday 27 March, 6 weeks and 3 days after the decision.

37. There is a good deal of authority as to what is meant by 'promptly' and how this test is to be applied. They are summarised in the relevant parts of the White Book. In *Re: Friends of the Earth* (1988) J.P.L. 93, Lord Denning MR (with whom Ralph Gibson LJ and George Waller agreed) held that, in respect of two of the grounds of challenge, a claim made on the last day of the 3 month period was not made promptly, mainly because the material on which the challenge was based existed (and was known to exist) before the issuing of the decision letter. Similarly in *R v Independent Television Commission* (1991) WL 839599, the Court of Appeal held that a claim made 2 weeks after the relevant decision on 4 December to award TV franchises was not made promptly, because the material for challenge had existed before the decision. In particular, it had been apparent since 16 October that the intention was to award the franchises to certain companies. The court also referred to the need for promptness because of the effect on third parties.

38. More recently, in *Finn-Kelcey v Milton Keynes* [2008] EWCA Civ 1067; [2009] ENVLR 17, the Court of Appeal held that the challenge to the local authority's decision of 14 January 2008 had not been made promptly, even though it had (just) been made within the 3 months. One of the reasons for that was that the relevant committee had resolved to grant planning permission a month before on 17 December 2007, and the decision of 14 January had been merely to adopt the decision of the committee. Again, the importance and need for promptness was re stated. Furthermore, the court accepted that the existence of a 6 week time limit for statutory reviews of decisions by the Secretary of State was a relevant consideration in assessing whether someone had acted promptly in challenging the grant of a planning permission by a local authority. "It emphasises the need for swiftness of action" ([24]). *Finn-Kelcey* was expressly approved by Sales LJ (as he then was) in *R (Gerber) v Wiltshire Council* [2016] 1 WLR 2593 at [11] and [49]. Comparison may also be made with the 6 week time limit for challenges to a development consent order for a nationally significant infrastructure project (s. 118 of the Planning Act 2008) and judicial reviews of decisions under the "planning acts" (CPR 54.5(5)). The approach taken in *Finn-Kelcey* is relevant to the analogous circumstances of the present case. Whilst the decision was not a development consent, HS2 is regarded as a project of national importance and the proposed judicial review seeks to impede the implementation of the phase authorised by the 2017 Act.

39. In the present case, there are a number of reasons which point to the conclusion that the claim was not made promptly. We have already referred to the fact that it was made outside the 6-week period for planning cases generally. In addition, the facts demonstrate that the announcement on 11 February could have come as no surprise to anybody and had already been heavily trailed in the Press.

40. The failure to act promptly can be illustrated by reference to the particular arguments in the present case. Take Grounds 1 and 4, which are complaints based upon the process adopted by the OR. These Grounds rely heavily on the evidence of Lord Berkeley, the Deputy Chair of the OR. Lord Berkley made clear his dissatisfaction with the process in his letter to the First Defendant on 11 November 2019 and repeated those concerns in his Dissenting Report of 5 January 2020. Accordingly, the challenges based on

process rely on material that was heavily publicised and available to the Claimant many weeks before the decision he seeks to impugn was even made.

41. Although Grounds 2 and 3 are different, because they raise environmental matters, the points stem directly from the text of the OR Report itself. There is nothing which arises from information provided by the Defendants or the Interested Party after 11 February 2020. The challenge based on those natters could therefore have been raised several weeks ago.

42. The delay in making the challenge is important for another reason. The evidence before the court (and particularly the late statements from Ms Ryan and Mr Thomas) shows that we are right at the end of the period when works can safely be carried out to minimise the effect on protected species of birds and bats. Delay will have a deleterious effect and would mean that the clearance works will have to be delayed by another 5-6 months. That was an environmental reason why promptness was called for in this case.

43. In seeking to justify the period between 11 February and 27 March, Mr Wolfe QC sought to rely on the correspondence from the Claimant's solicitors noted above, in which they had sought information from the Defendants. In particular, he referred to the number of requests for all the documents which had been considered when the decision was made. The suggestion was that the failure to give clear answers to these requests was the main reason for the delay.

44. We reject that submission for two reasons. First, as explained in more detail in Section 4 below, we do not consider that this was a decision that was circumscribed by that sort of detailed consideration. The documents are immaterial. Secondly, the absence of this information was irrelevant even to the Claimant because, as Mr Wolfe QC accepted, the judicial review proceedings were commenced without that information. Receipt of this information was not therefore on anybody's 'critical path'.

45. For these reasons we have concluded that this challenge was not made promptly, and that the application to bring judicial review proceedings should be dismissed for that reason alone. However, in the light of the point made earlier, that this issue only arose at the hearing, and so was not fully argued, it is appropriate to go on and deal individually with the four Grounds of challenge. We start that analysis by analysing what we consider to be the legal limits of any possible challenge to the decision of 11 February 2020.

4. THE LIMITS OF ANY POSSIBLE CHALLENGE TO THE DECISION

46. At the start of his written submissions on behalf of the defendants, Mr Mould QC submitted that it was beyond argument that the two categories of works for Phase 1 of HS2 which the Claimant sought to injunct:

a) Were lawful, because they were authorized under the 2017 Act;

b) Have been the subject of environmental impact assessment in accordance with EU and domestic requirements, including public consultation, during the process of Parliamentary scrutiny;

c) Are the subject of petitions brought by local authorities and national and local wildlife and woodland trusts and heard by the Select Committees appointed by each House to hear petitions against the Bill.

d) Were subject to regulation by Natural England as competent authority through the operation of the licensing procedures laid down by Parts 3 to 5 of the Habitats Regulations.

e) Must be carried out in accordance with the requirements of the published HS2 Phase 1 Code of Construction Practice (February 2017).

47. These submissions were not challenged by Mr Wolfe QC on behalf of the Claimant. They are, in our view, self-evidently correct. In our view, this judicial review challenge must be considered in that context. To put the point another way, we consider that it would be wholly unrealistic to ignore these facts when considering the public law challenge.

48. This is to be contrasted with the limited nature of the OR and the decision taken in reliance upon it on 11 February. The OR involved 10 Panellists, not the innumerable people involved in the 5 years of the Bill stages leading to the 2017 Act. It had to produce a result in weeks, not years. Its stated purpose was to inform the decision as to whether HS2 should continue, not to consider the project from scratch. Essentially, the OR had to look and see what had changed since 2017 and to consider whether those changes meant that the project should be halted.

49. The limited nature of the OR and the decision taken in reliance upon it can be seen in several ways. There was no statutory basis for the decision to launch the OR in August 2019. The decision to commission the OR was not a prerequisite for lawful exercise of powers under 2017 Act for Phase 1 (or indeed for continuing to promote the Bill for Phase 2). There was no statutory or policy basis for the terms of reference. Mr. Wolfe QC accepted that it was a matter of judgment for the Chair as to how far the review should go in respect of the topics it considered and the information it obtained, which judgment may only be challenged on the grounds of irrationality (see *R (Khatun) v London Borough of Newham* [2005] QB 37 [35]; *R (Jayes) v Flintshire County Council* [2018] EWCA Civ 809 [14]).

50. Mr Wolfe QC's submissions focussed on the principle that a decision-maker, such as a Minister, is to be treated as knowing only those matters which he actually knows when he takes a decision and not what others, including departmental officials knew (paragraph 8 of the Statement of Facts and Grounds). In his oral submissions he placed emphasis on the decision of the Court of Appeal in *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 (see [23] to [38]). However, the extent of a Minister's actual knowledge is not in itself a public law ground for vitiating his decision. The real question is what as a matter of law *ought* the Minister to have known about when taking his decision. This was not tackled in the Claimant's written submissions, but it was addressed by the Court of Appeal at [39] to [65].

51. The public law test is whether the Secretary of State failed to take into account a consideration which was not only relevant but which he was *legally obliged* to take into account. This has nothing to do with the different question of whether a decision was vitiated by an error as to fact. The two should not be elided or confused (see the *Health*

Stores case at [60]). A government department does not have to draw a minister's attention to every relevant matter, but only to those matters which statute, or perhaps existing policy, require him to take into account, or which are so "obviously material" that he must, and not merely may, take them into account, applying the distinction recognised in authorities such as *CREEDNZ Inc v Governor General [1981] 1 NZLR 172*.

52. In this context, Mr Wolfe QC also relied on Dove J's decision in *Stephenson,* but we derive little assistance from that decision, concerned as it was with a process of consultation on the NPPF, a policy document used in development control decisions. By contrast, the Report of the OR was not a policy document. It was a process to inform Government's decision as to whether and if so how to proceed with HS2. There was no process of consultation and there was no draft document upon which the public or a group of consultees were consulted.

53. The Claimant now seeks to challenge the Secretary of State's decision to proceed with the HS2 project. There was no statutory basis for the decision to proceed. During oral submissions it became common ground that neither the OR nor the decision it was to inform constituted part of any statutory process. The Secretary of State was effectively exercising common law powers which contain no lexicon of matters which must be taken into account. There was no duty to give reasons. It was the exercise of a common law power, in relation to which Lord Sumption in *Sandiford* [2014] 1 WL 2697 said at [83]:

"A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power …"

54. In his written statement to the House of Commons dated 3 September 2019 the First Defendant explained that the Report of the OR would inform the decisions on the next steps to be taken. It was not suggested that those decisions would be based solely on the OR. In the *Buckinghamshire* case the Supreme Court recognised that a decision whether it was in the public interest to proceed with a project such as HS2 is a matter of national political significance, and therefore was appropriately dealt with by the legislature ([108]). The same applies to the decision taken on 11 February 2020. It was a "macro-political" decision (*R (Begbie) v Secretary of State for Education and Employment* [2000] 1 WLR 1115, 1131). The Secretary of State is accountable to

Parliament for the decision. The functions he exercised were not constrained by legislation.

55. In these circumstances, a judicial review of that decision would involve only a low intensity of review (see e.g. Carnwath LJ (as he then was) in *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364 at [91]) and *Plant* [2017] P.T.S.R. 453 at [62]-[69]. In the Heathrow case, this court had to address the standard of review for a challenge to a national policy statement (see *Spurrier and others v Secretary of State for Transport* [2020] P.T.S.R. 240 at [141] – [184]. That part of the judgment usefully summarises the key cases on intensity of review. It was not only not criticised by the Court of Appeal, parts of it were expressly endorsed. Accordingly, when dealing with matters depending essentially upon political judgment, matters of national economic policy and the like, the court will only intervene on grounds of bad faith, improper motive and manifest absurdity: see [147], [149], [153].

56. In a situation where a Minister is considering a review of a complex project which did not involve a call for evidence, it seems to us to be a nonsense to suggest that the Minister could only be assumed to know about the review, and not the Parliamentary process by which environmental issues have been and will be addressed and Phase 1 has been approved. The Review cannot be divorced from that process in the way suggested by Mr Wolfe QC; on the contrary, as paragraph 2.3 of the Report itself made clear, the OR did not start from a blank sheet of paper, because of all the proceedings which ahd resulted in the 2017 Act.

57. In the present case, we are confident that, at the time of the decision on 11 February 2017, the First Defendant can be assumed to have known the parliamentary processes for the approval of the HS2 project (and, for example, the 2017 Act), the Dissenting Report of Lord Berkeley, and the OR Report. In our view, the only realistic way in which that decision can be impugned is by way of judicial review on *Wednesbury* grounds, namely that it was irrational for the First Defendant not to take into account something that was "obviously material". That is a 'light touch' review, for the reasons noted above. However, although that is our general approach, we have also addressed below the different ways in which Mr Wolfe QC sought to argue his Grounds.

5. GROUND 1: THE OR PROCESS

5.1 Submissions

58. Ground 1 alleges that the First Defendant fundamentally misunderstood the basis on which, and process by which, the Report following the OR was published. It is alleged that the process departed in certain respects from the published terms of reference. It appeared that Mr Wolfe QC was suggesting that the First Defendant was labouring under a mistake of fact (that the process in fact adopted did not comply with the terms of reference). The submission was that there had been a failure to take into account a consideration or an error of fact (as per *E v Home Office* [2004] QB 1044 at paragraphs 63-67).

6.2 The Difficulties in Principle

59. Mr Wolfe QC asserted that his argument involved asking the court to interpret the terms of reference for itself, to be able to identify the alleged departures summarised in

Paragraph 51 of the Statement of Facts and Grounds. But we do not agree with that approach: the terms necessarily involve judgment about what precise subjects to examine, how to go about examining them and how far to go. That is patently not a matter for the court: see *Khatun*, which emphasises that the only legitimate ground for challenge is irrationality and/or a failure by the person compiling the report to draw to the decision-maker's attention something which was a consideration which the law required to be taken into account or was "obviously material".

60. Viewed in this way, it does not matter that the Defendants have not explained in detail exactly what was put before the First Defendant at the time of the decision. The real question was whether the deficiencies in the OR alleged by the Claimant related to matters which officials had to put before Ministers because they were something which Ministers were legally obliged to take into account. As Mr Mould QC correctly submitted, the announcement to set up the review made it plain that that would "inform" Minister's decisions on whether to proceed with HS2; the announcement did not say that their decision would be solely based on the OR Report.

6.3 Discussion

61. We do not consider that this Ground is arguable on the evidence. The suggestion that the First Defendant was unaware of the alleged departures from the terms of reference is untenable. These had been publicised by Lord Berkeley in his Dissenting Report of 5 January 2020. The witness statement of Mr Haslam makes plain that the First Defendant had a copy of the Dissenting Report when he made his decision. There is no realistic prospect of suggesting that the First Defendant was not aware of these alleged issues.

62. Still further, we do not consider that the alleged departures from the terms of reference gives rise to an arguable *Wednesbury* challenge. The Claimant's criticisms of the process rely on Lord Berkeley's witness statement, which we consider to be unpersuasive and unreliable. We accept that, acting in good faith and in accordance with his strongly-held views, Lord Berkeley quickly came to a sharply divergent opinion to that of Mr Oakervee and the remining Panellists. But it is clear that, as a result, he did not engage with all of the process as it went along. He accepts that, for example, he did not read all of the documents with which he was provided.

63. In particular, in our view, he never made any allowance at all for the fact that the OR had very limited resources, was not able to call for evidence, and was required to work extremely quickly in order that any delays to the OR and thus the HS2 project were kept to a minimum. Indeed, most of Lord Berkeley's criticisms of the process (from his comments on the terms of reference to the contents of his witness statement) arose from the inevitable speed and other limitations against which the OR had to be conducted. It appears that Lord Berkeley never came to terms with the severe constraints on the OR.

64. As to the specific reasons why we do not accept that the OR departed in any significant way from the published terms of reference, we refer to the eight specific criticisms at paragraph 51 of the Statement of Facts and Grounds. We consider that they are unfounded for the reasons noted below. Not one of them can be anchored back to a specific term of reference; not one of them can be said to be outside the terms of reference as published; each of them ignores the limited time and resources available to the OR.

65. *Criticism (i)*: the complaint is that the OR was led mainly led by Doug Oakervee and that the other Panellists ended their involvement on 31 October 2019. But both of these were a direct consequence of the time limits imposed on the OR, so were in accordance with the terms of reference, not contrary to them. We note that, with the exception of Lord Berkeley, all the other Panellists agreed with and approved the Report.

66. *Criticism (ii)*: the complaint is that there were only 5 meetings where all Panellists were in attendance (13, 20 and 27 September, and 17 and 25 October)[2]. Given the time constraints it might be said that it was remarkable that they managed as many. There were other meetings which, unsurprisingly, not all Panellists could attend. There was nothing in the published terms of reference which suggested a minimum number of meetings which everyone was obliged to attend or that no meeting should take place unless all Panellists, or even just the Deputy Chair, could attend.

67. *Criticism (iii)*: the complaint is that the report was not written by every member of the Panel and that much of the drafting was done by the Department of Transport. Given the challenges with which the OR was presented, both in terms of time and logistics, it was inevitable that officials would organise the mechanics of the OR and undertake drafting work on behalf of the Panellists and/or at the direction of Douglas Oakervee. That is not uncommon in public inquiries, particularly when everyone is working to a tight deadline. There was no part of the terms of reference which suggested the Report would be drafted by the entire Panel.

68. *Criticism (iv)*: the complaint that Lord Berkeley was unable to attend all the meetings has been dealt with above.

69. *Criticism (v)*: the complaint is that not all the meetings were set out in the final list included in the Report. Even assuming that were right, it could not possibly be said that such a slip invalidated the OR Report or rendered the decision based upon it irrational or unlawful.

70. *Criticisms (vi) and (vii)*: the complaint is that not all the documents were available to all the Panellists because of difficulties in gaining access to, or navigating, the Review's electronic filing system. Again, in view of the time constraints, we consider that it was understandable that not all documents were or could be seen by all the Panellists. Moreover, we note that Lord Berkeley did not read all of the documents that were made available to him in any event. Despite that apparent handicap, he was still able to produce a 71 page Dissenting Report.

71. *Criticism (viii)*: the criticism is that the Report was different to that which was leaked in November 2019 and by implication from what had been considered by Panellists. We were surprised that Mr Wolfe QC placed so much emphasis on this leaked document. In our view the fact that the Report contained some differences from an earlier draft was entirely unsurprising. Although the pre-action protocol letter from the Claimant's Solicitors dated 28 February 2020 annexed a list of textual differences, it was not shown that the Report differed materially from text considered by Panellists on

[2] Lord Berkeley's witness statement is contradictory: paragraph 19 refers to the meeting on 17 October, but paragraph 29 suggests it did not take place.

any point of real substance so that the Report was significantly misleading. The Chair's Forward clearly and properly stated as follows:

> "Throughout this report I refer to the conclusion and recommendations of the Review – these conclusions are mine and I reached them with the support and recommendations of my Deputy Chair and panel members. Discussions with my Deputy Chair and panel members were constructive and challenging. All the panel members, with the exception of the Deputy Chair, have confirmed they support the approach taken in the report."

No criticism can be made of what he said there. It cannot be argued that the Report failed to give an adequate explanation as to how it had been produced in response to the Terms of Reference.

72. Accordingly, we conclude that Ground 1 is unarguable; it has no realistic prospect of success. There were no significant departures from the terms of reference and any concerns which Lord Berkeley had as to process were known to the First Defendant. None of the claimant's criticisms of the process get anywhere near to establishing either a mistake of fact, much less an arguable *Wednesbury* challenge.

6. GROUND 2: LOCAL ENVIRONMENTAL CONCERNS

6.1 Threshold Point

73. Although we analyse below the ways in which Ground 2 was argued at the hearing, we should say at the outset that we consider that this Ground fails at the very first hurdle. Mr Wolfe QC accepted that there was nothing in the challenge under this Ground which raised anything which had not already been considered by Parliament during its deliberations leading up to the passing of the 2017 Act. In other words, the environmental concerns relied on did not arise out of any changes in the situation since the 2017 Act was passed; neither did they arise out of anything that the OR did or failed to do. They are simply a re-run of the points made 4, 5, 6 years ago during the debates about HS2. In our view, therefore, it is entirely illegitimate to seek to reopen these matters in the guise of a challenge to the OR and the decision of 11 February.

6.2 Submissions

74. This ground (addressed in paragraphs 57 to 78 of the Statement of Facts and Grounds) is concerned with the environmental impacts of HS2 other than those relating to climate change (which is dealt with under Ground 3).

75. The Terms of Reference stated that the review should "rigorously examine and state its view on" (inter alia):

"the full range of benefits from the project, including but not limited to:

- capacity changes both for services to cities and towns on HS2 and which will not be on HS2
- connectivity

- economic transformation including whether the scheme will promote inclusive growth and regional
- rebalancing
- environmental benefits, in particular for carbon reduction in line with net zero commitments
- the risk of delivery of these and other benefits, and whether there are alternative strategic transport schemes which could achieve comparable benefits in similar timescales

the full range of costs of the project, including but not limited to:

- whether HS2 Ltd's latest estimates of costs and schedule are realistic and are comparable to other UK infrastructure
- why any cost estimates or schedules have changed since the most recent previous baselines
- whether there are opportunities for efficiencies
- the cost of disruption to rail users during construction
- whether there are trade-offs between cost and schedule; and whether there are opportunities for additional commercial returns for the taxpayer through, for example, developments around stations, to offset costs
- what proceeding with Phase 1 means in terms of overall affordability, and what this means in terms of what would be required to deliver the project within the current funding envelope for the project as a whole"

76. The Report stated that the OR had "looked at the project from multiple perspectives" which included "the environmental case for and against HS2, particularly in the light of the Government's recent commitment to net zero carbon emissions by 2050 and the impact of the construction of HS2 itself on the environment."

77. The Claimant infers that the Report was expected to give a full account of the "environmental impacts of HS2" which were material to a decision on whether or not to proceed with the project. Consequently, it is submitted that the decision-maker would have proceeded on the basis that the only significant environmental impacts to be weighed in that decision were those set out in the OR Report.

78. The Claimant then submits that the Report gave a very incomplete assessment of environmental impacts and since, in the absence of any further and specific evidence, the decision-maker must be taken to have taken into account only those matters drawn to his attention in that document, he proceeded on a misapprehension that there were no other significant impacts and/ or he failed to take them into account. By way of example, it is said that the report failed to address the loss of ancient woodlands and veteran trees, effects on groundwater from tunnel boring operations, damage to Sites of Special Scientific Interest and biodiversity, and impacts on rights of way, ancient hedgerows, farmland, cultural heritage and scheduled monuments. A number of bodies, including the RSPB, the Woodland Trust and the Chilterns Society made representations to the Review on such matters.

6.3 The Report

79. The OR Report addressed environmental impact (other than climate change) in the section entitled "localised environmental impacts" which included the following:

"6.14 In addition to carbon emissions (described in section 5 above), it is also important to note other environmental considerations, including impacts on woodland, landscape, biodiversity and more broadly on built and natural environments. Though such impacts are, in many ways, unavoidable on a project like HS2, it is vital that appropriate mitigation and compensatory measures are implemented by HS2 Ltd.

6.15 Although the evidence submitted to the Review has been mixed, HS2 Environmental Policy aims for HS2 to be an exemplar project:

- no net biodiversity loss; minimising carbon footprint, reinstating agricultural land, etc.
- ideally it will avoid environmental impact by design; where impact is unavoidable, the project will work to reduce and abate the impact and where this is not possible repair and compensation measures will be used.

6.16 The Review recognised the loss of habitats and potential impacts on certain species, for example barn owls, from HS2. It is understood that HS2 Ltd is seeking to implement mitigation and compensatory measures to address such impacts. Given the duration of the project, the Review considers that it is vital that environmental impacts, and mitigation and compensatory measures are kept under review to ensure such measures are effective.

6.17 One example of environmental impacts is the impact on woodlands, for which HS2 Ltd have put in place repair and compensation measures. On Phase 1, this includes the planting of 112.5 hectares of woodland in response to the direct loss of 29.4 hectares of ancient woodland. For Phase 2a, compensation measures to address the direct loss of 10.2 hectares of ancient woodland include the planting of 77.1 hectares of woodland. Similar figures are not yet available for Phase 2b given its current lack of maturity, although the Review has seen evidence to suggest that at least 10 ancient woodlands will be affected. The Review recognised however that planting new woodland is not a direct replacement or removing areas of ancient woodland.

6.18 The Review also noted that mitigating some negative impacts had caused a worsening of others: proposing deep cuttings or tunnels to avoid visual impacts and noise pollution from HS2 trains has, in the case of the deep cuttings, resulted in needing to transport large amounts of spoil during construction, with associated impacts on communities. It is not clear how well this issue (needing to move large amounts of spoil) and its impacts are understood by HS2 Ltd.

6.19 Ground investigations have also revealed that the quality of earth removed from cuttings and tunnels is unlikely to be of good enough quality to be re-used as originally planned for embankments elsewhere, further increasing the transport and storage impacts.

6.20 […]

6.21 More generally, disruption from the construction of HS2 will severely impact on communities up and down the line route. As indicated in section 10 below, HS2 Ltd needs to significantly improve how it treats individuals and communities affected by HS2 especially as it moves into the main construction phase. Further,

> in the design of Phase 2b, there may be opportunities to avoid, reduce or mitigate negative impacts – this should be looked into as a priority.
>
> **Conclusion 8: The Review recognised the impact of HS2 on woodland, landscape, biodiversity and more broadly on built and natural environments. Given the duration of the HS2 project, such impacts, along with any accompanying mitigation and compensatory measures, need to be kept under review.**
>
> **Conclusion 9: The Review recognised the impact on communities of construction of HS2, and HS2 Ltd should continue to mitigate these. There are opportunities in the design of Phase 2b to avoid, reduce or mitigate negative impacts**."

6.4 Discussion

80. We refer to Sections 2 and 4 above for the necessary factual and legal context for any consideration of Ground 2.

81. The reality is that it is impossible to construct a project on the scale of HS2 Phase 1 without causing interference with and loss of significant environmental matters, such as ancient woodland. But that interference and loss has been authorised by Parliament when it passed the 2017 Act into law (subject to any further necessary statutory consents being obtained).

82. In our judgment, it is plain that the terms of reference did not require the OR to assess the environmental impacts of Phase 1 in detail. That had already occurred in the recent Parliamentary process. That must have been known, indeed obvious, to the Defendants when they initiated the Review and considered its Report and when the decision to proceed was taken. The Claimant has not advanced any legal reason as to why that kind of assessment would need to be repeated.

83. Furthermore, the OR was asked to consider the HS2 project as a whole, not just Phase 1. Phase 2a is the subject of a Bill deposited before Parliament and awaiting consideration. Paragraph 6.22 of the Report referred to the intention at that stage to deposit a Bill for Phase 2b in June 2020. Environmental impact assessments will be carried out in detail through those Parliamentary proceedings. There is no indication in the terms of reference that the OR should carry out that type of assessment itself or should make a detailed appraisal of that work, a substantial part of which remains to be carried out.

84. For the reasons we have already set out, a proper understanding of the scope of the OR cannot be divorced from the period of less than 2 months within which it was expected to produce a report covering a wide range of topics. In the Chair's Forward to the Report, Mr Oakervee stated:

> "The short duration of the review meant we did not conduct a formal call for evidence but instead canvassed the views of a wide variety of interested parties all with different perspectives, both for and against the HS2 project."

In a further passage quoted in paragraph 75 of the Claimant's Statement of Facts and Grounds the Chair added:

> "Given the limited time available, the Review has faced a major challenge to undertake a deep examination of all the areas included in its Terms of Reference. I believe the Review has, though, provided views on the key issues."

The Claimant has made no criticism of the short duration of the review process or of the resources applied to it.

85. Plainly the terms of reference did not require the OR to undertake a detailed, or "full" environmental assessment, such as had already been carried out in the Parliamentary proceedings on Phase 1, or as remain to be considered for Phase 2a and b. Whilst those terms did ask for the "full range" of costs and benefits to be considered, there was no explicit mention of environmental impacts either in general or specifically (putting to one side for the moment climate change). As with other topics expressly referred to, albeit in very general terms (e.g. "economic transformation", "connectivity" and "opportunities for efficiencies"), it was a matter of judgment for the review process as to what matters would be covered in the Report, which could only be challenged by judicial review if irrational or *Wednesbury* unreasonable. The same legal test of irrationality governs whether any challenge to the ministerial decision itself may be made.

86. Environmental impacts either have been assessed in detail already (Phase 1) or will be (Phase 2). It was not suggested by Mr. Wolfe QC when asked by the court that the OR received any representations on environmental impacts of phase 1 which had not already been addressed in the proceedings on the Bill.

87. The OR did refer to the environmental impacts on ancient woodland, landscape, biodiversity and built and natural environments and recognised that they were to some extent unavoidable for a project such as HS2. It stressed the importance of the nominated undertaker carrying out appropriate mitigation and compensatory measures. Given the long duration of the project, the Report considered it to be vital that such matters be kept under review to ensure the efficacy of any measures undertaken. Express reference was made to the measures in respect of ancient woodland which are already required for Phase 1 or which are proposed for future phases.

88. In all the circumstances, it is not arguable that there was any legal requirement for the Report to refer to, or for the Defendants to take into account, any of the particular matters referred to in the Claimant's Ground 2. Nor was there any legal obligation for the decision made on 11 February 2020 to be based upon a full or detailed assessment of environmental impacts as the Claimant contends. This Ground is wholly unarguable.

7. GROUND 3: CLIMATE CHANGE

7.1 Submissions

89. This ground of challenge falls into two parts:

(a) The overall conclusion of the Report (and hence the Defendants' decision) in relation to the effect of the project on climate change failed to take into account the undertaker's expectation that carbon emissions during the construction

period would not be at the low end of a possible range and would therefore be higher (Ground 3a), and

(b) The Report failed to address (and hence so did the Defendants) the effect of the project on greenhouse gas emissions during the period leading up to 2050, and not just in 2050 and beyond, in accordance with the Paris Agreement and the Climate Change Act 2008 (Ground 3b).

90. The terms of reference asked the OR to address the scope for "carbon reduction in line with net zero commitments". As paragraph 86 of the Statement of Facts and Grounds says, this commitment by the Government to making the UK's contribution to the global climate change target set by the Paris Agreement has been enshrined in section 1 of the Climate Change Act (as amended on 27 June 2019). The relevant background has been explained by the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 at [17] and [184] *et seq* and in the judgment of the Divisional Court ([2020] PTSR 240 at [558] to [592]).

7.2 The Report

91. Paragraph 5.31 of the Report concluded that the construction of HS2 would add to carbon emissions:

> "In the short to medium term, the construction of HS2 is forecast to add to carbon emissions. The most recent estimates from HS2 Ltd on emissions from construction of the full HS2 network are at between 8m and 14m tonnes of CO2e (carbon dioxide equivalent) over the construction period, around 0.1% of current UK emissions on an annual basis. This is driven by the construction of tunnels, earthworks, bridges, viaducts and underpasses. The decisions to adopt straight alignments and very gradual gradients to reduce noise and visual pollution has led to the need for large excavations with bigger local impacts and the use of higher volumes of concrete – the production of concrete is carbon-intensive."

92. Paragraphs 5.32 to 5.36 examined the potential for the HS2 scheme to produce carbon savings during the operational phase firstly, by providing a form of transport which would be less carbon intensive than alternative methods of managing increased demand for travel and secondly, by encouraging modal shift from roads and domestic aviation. The Report referred to the estimate by the Interested Party that the project could save about 11-12m tonnes of carbon emissions over the first 60 years of operation. Paragraph 5.36 emphasised that achieving significant modal shift would depend upon HS2 forming part of an integrated government strategy to induce behavioural change, with measures to dissuade travellers from using carbon-producing modes of transport.

93. Paragraph 5.37 of the Report, followed by Conclusion 5, then brought together the effects of both the construction and operational phases of the project on carbon emissions:

> "On balance, taking into account both the construction and operation of HS2, it appears that HS2 is likely to be close to carbon neutral, though it is not clear whether overall HS2 is positive or negative for greenhouse gas emissions. *Based on the current assessment, if the low end construction emissions are achieved, HS2 will*

> *reduce carbon emissions by 3-4m tonnes of CO2e; at the high end, the project will contribute 1-3m tonnes of CO2e over the assessment period of construction and 60 years of operation*. It is therefore important for HS2 Ltd to continue to look for ways to be more carbon efficient, particularly in construction in the short-medium term.
>
> **Conclusion 5: The government's 2050 target has placed a new emphasis on the design, build and operation of the HS2 network. The ability to reduce carbon emissions in the construction of Phase One may be limited so focus should be placed on improving plans for Phase Two in this regard in particular. HS2 Ltd should look to drive innovation in construction and delivery of the project to reduce its forecast greenhouse gas emissions. Over the longer term HS2 should form part of an integrated government strategy to encourage people to shift to greener transport modes**." (Italics added)

7.3 Ground 3a

94. Ground 3a criticises the sentence which we have italicised in paragraph 5.37 of the Report because it is said to have failed to draw the Government's attention to another part of the study by the Interested Party from which the carbon estimates were drawn, which stated:

> "…However, these potential carbon reductions during operation need to be seen in the context of potential carbon increases during the construction phase (from paragraph 9.2.6), which are estimated to be between 8.4Mt CO2e and 14.0Mt CO2e. The smaller figure uses construction data for Phase Two that is based on the indicative design available at the current time. In practice, the Phase Two construction emissions are expected to be greater than this; the larger figure for construction emissions therefore accommodates an adjustment to account for a more developed Phase Two design based on the current, more detailed Phase One assessment of construction emissions."

The Claimant submits that the Report failed to tell the decision-maker that according to the nominated undertaker, construction emissions "would *not be* at the 'low emissions' end of the possible range" "which was key to the overall positive assessment in paragraph 5.37" (paragraphs 92(1) and 98 of the Statement of Facts and Grounds).

95. In our judgment, this is not a fair reading of the Report. It is first necessary to be clear about what the passage quoted by the Claimant from the study by HS2 Limited did and did not say. It did not state that construction emissions "would not" (to use the Claimant's phrase) be at the lower end of the range. Nor did the HS2 study state that they expected the construction emissions to be at the top of the range estimated, i.e. 14m tonnes. Instead, it stated that the construction carbon emissions were expected to be "greater than" the smaller figure of 8.4m tonnes. The larger figure of 14 million tonnes allowed for an "adjustment to account for a more developed Phase 2 design…". In other words, the study gave a *range* without saying where within that range the estimated carbon contribution would end up as a result of more detailed design work.

96. Accordingly, paragraph 5.37 of the OR Report fairly summarised the overall assessment regarding the construction and operation of HS2, by saying that either savings of 3-4m tonnes or an addition of 1-3m tonnes over a long period of more than 60 years was "close to carbon neutral". It was in that context that the Report added that it was not clear whether the project would end up positive or negative. Plainly that conclusion depended (in part) upon whether the construction phase ends up contributing additional carbon in excess of 11-12m tonnes. That is why the Report went on to say

that it was important for HS2 Limited to look for ways to be more carbon efficient, particularly in the short to medium term. Conclusion 5 recognised that the ability to do this for Phase 1 may be limited, and so the Report recommended that there should be focus on improving plans for the construction of Phase 2 in particular.

97. Read fairly and properly, the OR Report did take into account the passage quoted by the Claimant from the paper by the Interested Party, in particular the expectation that construction carbon emissions would be greater than 8m tonnes. The contrary is not arguable. Nor is it arguable that the Report was misleading or that there was any need for the Report to go into further detail. The Defendants have not failed to take into account a relevant factor to which they were legally obliged to have regard. Ground 3a is unarguable.

7.4 Ground 3b

98. Mr. Wolfe QC places considerable emphasis upon the decision of the Court of Appeal in the *Plan B Earth* case where it was held (inter alia) that that the Government's policy commitment to revised climate change targets in the Paris Agreement was an "obviously material" consideration which the Secretary of State had been obliged to take into account when he designated the Airports National Policy Statement.

99. The circumstances of that case were very different to the present dispute. There, the Secretary of State accepted that he has not taken the Paris Agreement into account at all, acting on the basis that it was not considered at that stage to be relevant [186], [228] to [231]. Furthermore, the Policy Statement was designated in June 2018, a year before the Climate Change Act 2008 was amended to reflect the Paris Agreement. Here, the OR was launched and the decision taken after that amendment had been made. Furthermore, the Claimant accepts that both the Report and the decision to proceed with HS2 took into account the Government's climate change commitments following the Paris Agreement, as expressed in the net zero target for 2050.

100. The complaint is that both the Report and the decision failed to address the importance of reducing the cumulative burden of carbon emissions in the period *leading up to* 2050. This is not only referred to in the Paris Agreement but also reflected in the setting of 5 yearly carbon budgets for the period leading up to 2050 under Part 1 of the 2008 Act.

101. This point is wholly unarguable. The passages from the Report which we have previously set out make it plain that neither the OR nor the Defendants restricted themselves to looking at the effect of the HS2 project on climate change in 2050, or what Mr. Wolfe OC referred to as a "spot measurement in the year 2050 itself" (paras. 88-89 of the Statement of Facts and Grounds). Instead, the Report considered the effects of the project before and after 2050 resulting from construction and the first 60 years of operation. The conclusion that the project is "likely to be close to carbon neutral" relates to that overall period, both before and after 2050. The OR considered that HS2 could be less carbon intensive than alternative forms of transport used to manage increased demand for travel (5.32) and also that it would produce carbon savings during the operational phase. It is obvious from the Report that the construction phase, which predates 2050, would increase carbon emissions during that period and that that effect is only off-set by carbon savings resulting from the operation of the scheme over a long period of time. The decision made on 11 February 2019 cannot arguably be challenged on the grounds of the "temporal" point advanced by Mr. Wolfe QC.

102. For these reasons we consider that both elements of Ground 3 are unarguable.

8. GROUND 4: LEGITIMATE EXPECTATION

8.1 Threshold Point

103. This Ground appears to raise the same process issues as Ground 4, but puts it by reference to what is said to be the Claimant's or the public's legitimate expectation of the nature, scope and extent of the OR. In our view, it fails in part for the same reasons as set out in Section 5 above. In particular, the legitimate expectations relied on are, in reality, entirely unrealistic, because they make no reference to the short time frame for the OR and all the other limitations placed upon it.

8.2 Submissions

104. Mr. Wolfe QC argues that there was an undertaking or promise by the First Defendant that the OR would be carried out in accordance with the terms of reference, but more particularly as the Claimant says they would have been understood by the "reasonable reader", either as set out in (a) the Statement of Facts and Grounds under Ground 1 (paragraphs 36 and 115) or (b) in the pre-action protocol correspondence. It is said that that undertaking or promise has been breached by the way in which the OR was carried out, no good reason has been given for that breach, and it was unfair for that legitimate expectation to have been breached, particularly in view of the strong public interest in the independence and robustness of the OR and a full assessment of the environmental impacts of HS2, bearing in mind the major and widespread environmental damage it would cause.

105. For the reasons we have given above, the Claimant's argument proceeds on a misunderstanding of the nature of the OR and its terms of reference. Furthermore, the challenge completely overlooks the environmental assessment already carried out in the Parliamentary proceedings on Phase 1 and which remain to be carried out for Phases 2a and b. There was no undertaking to carry out a "full assessment", or any detailed assessment, of the environmental impacts in the review which was to be carried out over a 2-month period in the Autumn of 2019. Much detailed work remains to be carried out.

106. As we have already pointed out, this was a macro-political process and decision, in relation to which the court's role in proceedings for judicial review is less intrusive (*Begbie*). The application of the terms of reference depended on the exercise of judgment by the Chair and the other Panellists. Neither the language used in the terms of reference, nor the context in which it was employed, was capable of giving rise to a promise of the kind which the Claimant and his legal team seek to extract.

107. Remarkably, that the terms of reference do not say what the Claimant wanted them to say appears to have been appreciated by the Claimant's solicitors when those terms of reference were first published. Paragraph 114 of the Statement of Facts and Grounds relies upon their letter dated 16 September 2019 in which they set out their understanding of the scope of the OR in an attempt to get the Secretary of State to agree with them. The letter suggested that in the OR it should not be assumed that "any previous conclusions as to claimed benefits of HS2 will be maintained". The letter then said, "if that is not so and things can nonetheless be assumed, please be clear what and

why". It appears that there was no response (much less agreement) to that part of the letter. So this part of the challenge proceeds on the basis of an interpretation which the Claimant and his advisors had failed to obtain agreement on at the time.

108. The Claimant relied upon the Supreme Court's summary of the principles on legitimate expectation set out in *Re Application by Geraldine Finucane for Judicial Review* [2019] UKSC 7. Thus, the understanding or promise relied upon must be "clear and unambiguous" ([62]). The court referred to the well-known decision in *R v Inland Revenue Commissioners v MFK Underwriting Agents Limited* [1990] 1 WLR 1545 where the same principle was laid down at p.1569.

109. We have reviewed the exchange of correspondence between the parties before the claim was issued and can find nothing which could arguably support the legitimate expectation as to the process and ambit of the OR as set out in paragraph 36 of the Statement of Facts and Grounds, either wholly or in part. Ground 4 is unarguable.

9. THE CLAIM FOR AN INTERIM INJUNCTION

110. The claim for judicial review seeks to challenge the decision that the HS2 project should proceed, both Phase 1 which has been authorised by the 2017 Act and Phases 2a and b which have yet to be considered by Parliament. But the application for an interim injunction does not seek to prevent the carrying out of all further works on the project, in particular Phase 1. Instead, the application seeks to prohibit any works or activity which will cause the loss and/or destruction of ancient woodland or the disturbance of European protected species and/or their nesting, breeding or resting sites. The object is to prevent irreversible damage about which this particular Claimant is concerned, such as the cutting down of trees in ancient woodlands while his application to seek a judicial review is being considered and determined.

111. Mr. Wolfe QC relied on the decision by the Secretary of State on 16 September 2019 to order that the removal of ancient woodland should cease during the Oakervee Review unless "absolutely necessary to avoid major costs and schedule impacts should the scheme proceed as planned." As already noted in Section 2 above, on 2 October 2019 the Government published a press release explaining the assessment by HS2 Limited of 11 ancient woodlands parts of which were due to be affected by works in Autumn 2019. It was decided that works on 6 of the sites would be deferred until "early 2020" and on the remaining 5 until Autumn or Winter 2020. It is those 6 sites upon which the application for an interim injunction is focused.

112. Mr. Wolfe QC submitted that in effect the Claimant is asking the court to press the same "pause button" as the Secretary of state did in September 2019. But as Mr. Mould QC pointed out, that is not so. The pause ordered in September 2019 simply had the effect of stopping work pending the OR and did not prevent "absolutely necessary" work. The OR has now been concluded and the Government has decided that the project should proceed, including the Phase 1 works authorised by the 2017 Act. These works are now under way and there is a critical path for the construction programme.

113. In his witness statement Mr. Peter Miller, the Environment and Town Planning Director within the Infrastructure Directorate of HS2 Limited, explains that work needs to be undertaken at 5 woodland sites between 3 April and the end of May 2020 to enable the construction of access and haul routes. The haul routes are on the critical path of the

construction programme for Phase 1. These works include the felling of some trees. Access and limited tree clearance is also necessary at a sixth site, South Cubbington Wood, to enable ground investigation surveys to be carried out for the completion of the final designs for the railway through that area.

114. Within five of the woodlands (but not the woodland to the south of Ashow Road) it is necessary for branches and trees to be lopped or felled to discourage European protected bats from entering those areas during clearance and so avoid risk to the "conservation status" of these species. The court was shown licences issued by Natural England under the Habitats Regulations 2017 and other legislation authorising works which affect these and other protected species. In addition, Mr Miller explains that it is necessary for the contractors to avoid as far as possible the bird nesting and rearing season, which runs between March and August. It is said to be essential that clearance works which have been programmed for April 2020 should be undertaken without delay, or else they would have to be postponed to late August or early September 2020. But because of additional protection requirements for bats, clearance work could not in practice recommence until early October.

115. The court asked for assistance on the numbers of trees programmed to be felled between 10am on 3 April and 4pm on 6 April 2020. The Government Legal Department replied on 1 April 2020. The precise number of trees involved have not yet been given since, we are told, that that depends on an assessment on site as work is undertaken. Accordingly, the numbers are expressed as ranges for each of the relevant woods. We also bear in mind that the word "tree" can apply to a wide range of specimens in terms of ages and size. It appears that between 400 and 800 "trees" would be felled during this period. The court has not been given any figures for the numbers of trees to be felled after 6 April 2020.

116. The parties agreed that the court should apply the approach to the grant of an injunction in a public law claim set out by Cranston J in *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) at [6] to [7] and [12].

117. First, it is necessary for the Claimant to show a real prospect of success on one or more of his legal grounds of challenge. We have already concluded that none of them are arguable and so he fails to satisfy this test. This is a fundamental consideration in this application for an interim injunction because the Court of Appeal has emphasised the importance of the public interest where such an application is made against a public authority discharging its public law functions (*Sierbein v Westminster City Council* (1987) 86 LGR 43). In relation to Phase 1, Parliament has addressed the public interest considerations when it decided to enact the 2017 Act. It is not suggested that any of the works the subject of this application fall outside the range of matters placed before Parliament or the authority conferred by the Act. There is no suggestion that any necessary species protection licence has not been obtained. In any event, a breach by the Interested Party of the relevant conservation legislation would not be matter for judicial review; rather it would be a matter for Natural England, which has the necessary enforcement powers.

118. Both parties agreed at the hearing that it would be appropriate for the court to deal with the application for permission at this stage. Having carefully considered the papers and heard oral submissions, we have reached the clear and firm conclusion that, for the reasons noted above, each of the proposed grounds of challenge is unarguable, and so

the appropriate course is for the court to refuse permission. In these circumstances, not even the irreversible damage and other harm upon which the Claimant relies could possibly justify the grant of the interim injunction sought. Accordingly, the application for an interim injunction should be refused. On that basis it is unnecessary for the court to go to go any further in considering the balance of convenience.

119. Nevertheless, we have considered the various matters which the parties submitted went into that balance.

120. We fully appreciate that the works would bring about irreversible damage on a substantial scale. The Claimant also points to other ancient woodlands that would be affected by the phase 1 works (footnote 15 to the Statement of Facts and Grounds).

121. But as we have previously said, there is no suggestion that the impacts involved, including the effect on fauna in the woodlands as well as the trees themselves, involves matters which have not previously been assessed in the Parliamentary process and have not been provided for in the EMRs. The decision which the Claimant seeks to challenge is not a development consent, or indeed any decision which the law required to be taken, in order for the carrying out of the works to be lawful. It was essentially a political decision as to whether the Government considered that the project should proceed, and if so, in what manner. The decision that HS2 should proceed included phase 1 which has already been fully assessed for environment impacts and found by Parliament to be acceptable notwithstanding those impacts. These are powerful considerations which very substantially reduce the weight to be given to the damage relied upon by the Claimant.

122. On the other side of the balance, the Defendants point to the effects of the delay which would be caused by the grant of the injunction sought. The works which would be prohibited could not be carried out before October 2020. They lie on the critical path for the construction of the relevant sections of phase 1 and so there would be a consequential delay to the enabling works, main works and the railway systems works. We are told that in the time available it has not been possible to complete the modelling necessary to quantify some of these costs. But those additional costs which it has been possible to quantify amount to £25m. It is estimated that there would be additional indirect costs in the region of £9m. It is also said, albeit with no supporting detail, that the most significant cost impact would be for main works. That cost has yet to be modelled, along with the impact on railway system contracts and the loss of operating revenue.

123. The draft order for an injunction provides for a cross-undertaking as to damage but, in accordance with paragraph 5.3(1) of CPR PD 25A, this liability together with that for the costs of the proceedings is limited to the Aarhus cost cap (CPR 45.43 to 45.45).

124. Having regard to all these matters we are in no doubt that the balance of convenience comes firmly down against the grant of an injunction.

125. We are further reinforced in this view by the implications which the grant of an injunction on this application is likely to have for other sections of Phase 1. Save for Ground 2, the legal merits of the proposed grounds of challenge have no connection with the interests which the interim injunction seeks to protect. The arguments advanced by the Claimant, including those under Ground 2 regarding full

environmental assessment, could potentially be relied upon in relation to other parts of Phase 1. Thus, the adverse consequences for Phase 1 of the HS2 project in terms of uncertainty, delay and costs would be far greater than those identified so far in response to the current application We appreciate that in the other side of the balance, the environmental and indeed other harm resulting from the whole of Phase 1 would also be much greater than the harm identified for the purposes of the Claimant's application. But once again, it is necessary to bear in mind that that harm has already been assessed through the Parliamentary process and it has been judged that the project should nevertheless proceed in the national interest. These considerations underscore why it has been so important for the court to grapple with the fundamental question of whether the grounds of challenge are legally arguable at this stage.

10. CONCLUSIONS

126. For the reasons set out in Section 3 above, we consider that the application for permission to apply for judicial review was not made promptly and falls to be dismissed in any event.

127. For the reasons set out in Section 4 above, we consider that the OR and the decision based upon it were limited in scope and macro-political in nature and that, in consequence, the only realistic basis on which the decision could be impugned is on conventional, 'light touch' *Wednesbury* grounds.

128. For the reasons set out in Section 5 above, we reject as unarguable the challenge based on the process adopted by the OR and the alleged departure from the terms of reference. The First Defendant was not misled and there was no or no significant departure from the terms of reference.

129. For the reasons set out in Section 6 above, we reject as unarguable the challenge based on the alleged misunderstanding as to the local environmental conditions. The First Defendant was not misled and there was no requirement for the Report or the Defendants' decision to refer to or take into account any of the matters relied on in Ground 2.

130. For the reasons set out in Section 7, we reject as unarguable the challenges based on carbon emissions and Climate Change. As to the Ground 3a, we consider that on a proper reading, the OR Report took into account the passage in the Interested Party's report as to construction carbon emissions. As to Ground 3b, the OR Report made plain that it had considered the effects of the project both before and after 2050.

131. For the reasons set out in Section 8 above, we reject as unarguable the challenge based on legitimate expectation. In our view, this adds nothing to Ground 1. In any event, there is nothing which could arguably support the legitimate expectation as to the process and ambit of the OR suggested by the Claimant.

132. Accordingly, the application for permission to apply for judicial review must be refused and we consider that there is no justification for the grant of any interim injunction.

133. For the reasons set out in Section 9 above, we consider that, even if we were wrong and that one or more of the Grounds was arguable or had a realistic prospect of success, the balance of convenience favours the continuation of the clearance works. There is a

significant disconnect between the Grounds for the judicial review application and the claim for an interim injunction. In any event, the clearance works were long ago authorised by Parliament and there is a strong public interest in ensuring that, in a democracy, activities sanctioned by Parliament are not stopped by individuals merely because they do not personally agree with them.